80-598

No. _____

Supreme Court, U. S.
FILED
OCT 14 1980
MICHAEL RODAK, JR., CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1980

David W. Joly, Assistant Principal
Quincy Public Schools, Quincy,
Massachusetts (Petitioner)

v.

Lawrence P. Creedon, Superintendent
Quincy Public Schools, Quincy,
Massachusetts (Respondent)

Petition for a Writ of Certiorari to the

United States Court of Appeals

For the First Circuit

Represented by:

Thomas P. Kramer, Esq.
1020 Plain Street
Marshfield, MA 02050
(617) 837-5000

Submitted by:

David W. Joly, Petitioner
48 North Bayfield Road
Quincy, MA 02171
Tel. 617/328-4340

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1980

David W. Joly, Assistant Principal
Quincy Public Schools, Quincy,
Massachusetts (Petitioner)

v.

Lawrence P. Creedon, Superintendent
Quincy Public Schools, Quincy,
Massachusetts (Respondent)

Petition for a Writ of Certiorari to the

United States Court of Appeals

For the First Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States: David W. Joly, Petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on July 16, 1980.

QUESTIONS PRESENTED FOR REVIEW

1. Relationship between Federal courts

and the grievance-arbitration machinery of collective bargaining agreements in the resolution and enforcement of an individual's rights as guaranteed by the Federal constitution and Federal statutes.

2. Equal protection clause of fourteenth amendment relative to procedural differences in administrative hearings and judicial hearings concerning an individual's rights as guaranteed by the Federal constitution and Federal statutes.

3. Requirements of due process relative to "liberty" specifically, denial of hearing to address the question of "stigma."

4. Individual's right to interstate travel in pursuit of his profession without "stigma" created by written material in individual's personnel file.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Invoked	1
Statement of the Case	2
Reasons for Granting Writ	9
Conclusion	15
Appendix	
1. Judgment Sought to be Reviewed	16
2. Unpublished Opinion of Appeals Court	17
3. Judgment of District Court	24

CITATIONS

Cases:

Acanfora v. Board of Education of Montgomery County, 491 F 2d 498, Certiorari denied (1973)	13
Barry v. Barchi, 443 U.S. 55, 61 L Ed 2d 365, 99 S CT 2642 (1979)	12
Carey v. Piphus, 435 U.S. 247, 259-262, 266-267, 55 L Ed 2d 252, 98 S CT 1042 (1978)	11
Dunlop v. Backowski, 421 U.S. 560, n7, 568-574, 44 L Ed 2d 377, 95 S CT 1851 (1975)	12
Expeditions Unlimited Aquatic Enterprises v. Smithsonian Institute 566 F 2d 289, Certiorari denied	13
Goldberg v. Kelley, 397 U.S. 254, 264, 25 L Ed 2d 287, 90 S CT 1011 (1970)	14
Griffin v. Breckenridge, 403 U.S. 88, 105-106, 29 L Ed 2d 338, 91 S CT 1790 (1971)	14
Huntly v. Community School Board of Brooklyn, NY, 543 F 2d 979 (1976)	13
Linda R.S. v. Richard D., 410 U.S. 614, 35 L Ed 2d 536, 93 S CT 1146 (1973)	12

Page

Magans v. Lavine, 415 U.S. 528, 94 S CT 1372 (1974) 12

Moog Industries Inc. v. F.T.C., 355 U.S. 411, 414, 2 L Ed 2d 370, 78 S CT 377 (1958) 12

Mt. Health School District Board of Education v. Fred Doyle, 402 U.S. 274, 50 L Ed 2d 471, 97 S CT 568 (1977) 11

United States v. Guest, 383 U.S. 745, 757-758, 16 L Ed 2d 239, 86 S CT 1170 (1966) 14

OPINIONS BELOW

The unpublished opinion of the Court of Appeals appears in the appendix hereto. The unpublished opinion of the District Court appears in the appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on July 16, 1980, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment (Due Process, Equal Protection and Property Rights)

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code, Title 28 Section 1343(3).
Civil rights and elective franchise.

"To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

United States Code, Title 42 Section 1983.
Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

STATEMENT OF THE CASE

Petitioner Joly brought suit in the U.S. District Court for the District of Massachusetts,

against Respondent Creedon seeking to obtain a declaratory judgment.

Petitioner, David W. Joly (etc.), who is and was at all times relevant hereto a public school teacher for twenty-three years and has been, since 1967, an Assistant Principal in the Quincy Public School System, Quincy, Massachusetts.

Respondent, Lawrence P. Creedon (etc.), is and has been since 1966 the superintendent of schools for the City of Quincy, Massachusetts, is Chief Executive Officer and Constitutional Officer of the Quincy Public School System with responsibilities for overseeing the instructional, administrative and financial activities of the said school system.

The Petitioner, in his capacity, has served in the same school building under three principals for ten years; performing a specific classroom activity that was classified, by three principals, as within the framework of prescribed subject matter. The above specific classroom activity had previously been approved by the

Respondent for use in the Quincy Public School System.

The Petitioner received a letter dated May 7, 1979, from his immediate supervisor (fourth principal). This letter, in part, stated, "it is unfortunate that your actions have caused unnecessary distress for students, parents, and administrative staff and for you." The above letter was placed in the Petitioner's personnel file as a permanent part of his record without benefit of a hearing.

The Petitioner received a letter dated May 8, 1979, from the Director of Elementary Education stating, in part, the following: "It is not my general practice to respond to such a letter, but I felt that the seriousness of this situation required a response from me." The above letter was placed in the Petitioner's personnel file as a permanent part of his record without benefit of a hearing.

The Respondent affirmed the action of the two above administrators, without the benefit of hearing.

On August 24, 1979, Petitioner filed a complaint in the U.S. District Court for Massachusetts seeking a Summary Judgment. On February 19, 1980, U.S. District Court for Massachusetts denied Petitioner's motion for Summary Judgment.

On February 20, 1980, the Quincy Patriot Ledger (local daily newspaper serving approximately 200,000 people) printed an account of U.S. District Court decision of February 19, 1980, which prompted certain parents to first write letters to Quincy Public School officials objecting to a "controversial" teacher (Petitioner) in a classroom with their children and the parents demanded that the Quincy School Committee meet to discuss the possible removal of the teacher (Petitioner) from the present school. The Quincy School Committee met in executive session with the abovementioned parents, Petitioner, Respondent, and Attorney for Respondent. The parents were not satisfied, the School Committee has not reached a decision on the matter, and all correspondence concerning-

the matter has been placed in the Petitioner's personnel file as a permanent part of Petitioner's record.

On March 3, 1980, the Petitioner met with representatives of the Massachusetts Teachers Association and the Quincy Education Association relative to consideration of the grievance-arbitration machinery, as suggested by the District Court Judge at the February 19, 1980, hearing.

The Petitioner was told by the above representatives that he (petitioner) was never entitled to a hearing in grievance and still is not entitled to a hearing in grievance regardless of what the Judge had to say. The above representatives stated that the contract reads "hours, wages and conditions of employment" and that is a narrow definition which will not be stretched.

The Quincy Public Schools and the Quincy Educational Association have a contractual agreement concerning the "hour," "wages," and "conditions of employment" and are the only

classifications in which a teacher may seek a redress of grievances.

The above contract ("Grievance and Arbitration Procedure") states the following:

1. "The purpose of the procedure set forth hereinafter is to produce prompt and equitable solutions to those grievances which, from time to time, may arise and affect wages, hours and conditions of employment covered by this contract."
2. "The Arbitrator shall have the authority to settle only a grievance which concerns misinterpretation or misapplication or violation of the express terms of this agreement. This Arbitrator shall have no power to add to, subtract from, or modify this agreement.

If a teacher is accused in writing of an act, defined or undefined, the teacher's only recourse is to write a letter in opposition and then both letters are placed in the teacher's

personnel file as a permanent part of the record. The only way possible to remove the accusatory letter is through the grievance procedure. If the matter is outside the confines of "hours," "wages," or "conditions of employment" the accused teacher has no forum for redress of grievances (this is the case now before the bar).

The actions taken by the Respondent against Petitioner were executed while a duly sworn constitutional officer and chief executive officer of the Quincy, Massachusetts, School System and within the framework of state statute.

Respondent is responsible for all acts against the Petitioner by the subordinates since they were acting by direction of official policies recommended and implemented by Respondent.

The Respondent has never allowed a hearing to any teacher for any reason.

On July 16, 1980, the First Circuit affirmed the judgment of the District Court in denying

Petitioner a Summary Judgment.

REASONS FOR GRANTING THE WRIT

The problems of impartial adjudicative proceedings which are inherent in this case are not restricted to Petitioner and the Quincy Public School System but are prevalent in school systems in every state in the union and affecting many thousands of teachers.

This case concerns the proper relationship between Federal courts and the grievance-arbitration machinery of collective bargaining agreements in the resolution and enforcement of an individual's rights as guaranteed by the Federal constitution and Federal statutes. Specifically, the court must decide under what circumstances, concerning individual civil rights, may an individual seek redress of grievances in the Federal courts.

Since an employee's contractual rights and remedies under a collective bargaining agreement result from concessions already made by the Union as part of the economic bargain struck with the employer, no additional con-

cession may be extracted from an employee as the price for enforcing those rights.

An arbitrator having no general authority to invoke public laws that conflict with the bargain between the parties is confined to interpretation and application of the collective bargain agreement regardless of whether parts of this agreement resemble provisions of the Federal constitution or Federal statutes. An arbitrator exceeds the scope of his submission where the arbitral decision is based solely on the arbitrator's view of the requirements of enacted legislation rather than on interpretation of the collective bargaining agreement.

The doctrine of election of remedies is applicable in the present context, which involves constitutional and statutory rights distinctly separate from the employee's contractual rights, regardless of the fact that the violation of both rights have resulted from the same factual occurrence.

Permitting an employee to resort to the judicial forum does not undermine the employer's

incentive to arbitrate but it does comport with the congressional objective that the Federal courts should exercise the final responsibility for the enforcement of provisions in the Federal constitution and statutes.

The Supreme Court has found it necessary to formulate a test for causation which distinguishes between a result caused by a constitutional violation and one not so caused. See Mt. Healthy City School District Board of Education v. Fred Doyle, 402 U.S. 274 50 L Ed 2d 471, 97 S CT 568 (1977).

Impartiality in adjudicating proceedings safeguards the two central concerns of due process, the prevention of unjustified or mistaken deprivations and the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals. See Carey v. Piphus, 435 U.S. 247, 259-262, 266-267, 55 L Ed 2d 252, 98 S CT 1042 (1978). Public officials and administrative prosecutors performing judicial

or quasi-judicial functions are not applicable to those acting in a prosecutorial capacity. See Linda R.S. v. Richard D., 410 U.S. 614, 35 L Ed 2d 536, 93 S CT 1146 (1973); Moog Industries Inc. v. FTC, 355 U.S. 411, 414, 2 L Ed 2d 370, 78 S CT 377 (1958); Vaca v. Sipes, 386 U.S. 171, 182, 17 L Ed 2d 842, 87 S CT 903 (1967). In cases which the enforcement decisions of an administrator were motivated by improper facts or were otherwise contrary to law are not immune from judicial scrutiny. See Dunlop v. Backowski, 421 U.S. 560, 567, n7, 568-574, 44 L Ed 2d 377, 95 S CT 1851 (1975). When the difference between procedures concerning administrative hearings for individuals is violative or equal protection, the individual is constitutionally entitled to a hearing to meet the requirements of due process. See Barry v. Barchi, 443 U.S. 55, 61 L Ed 2d 365, 99 S CT 2642 (1979). Obviously, claims under the equal protection clause are rights secured by the constitution and laws within the meaning of 42 U.S.C.A., Section 1983. See Magans v.

Lavine, 415 U.S. 528, 94 S CT 1372 (1974).

If teacher's good name, reputation, honor or integrity is at stake because of what school administration is doing to him, notice and opportunity to be heard are essential for administrative due process. See Acanfora v. Board of Education of Montgomery County, 359 F. Supp. 843, affirmed 491 F 2d 498, certiorari denied, 95 S CT 64, 419 U.S. 836, 42 L Ed 63 (1973). Damage to reputation is not inconsequential and can qualify for procedural protection under due process clause. See Expeditions Unlimited Aquatic Enterprises v. Smithsonian Institute, 566 F 2d 289, certiorari denied, 98 S CT 3144, 438 U.S. 915, 57 L Ed 2d 1160 (1977). Charges that acting principal failed to demonstrate quality of leadership, created climate of confusion and discontent such as to stigmatize him without fair hearing and deprived him of "liberty" in violation of his due process rights. See Huntly v. Community School Board of Brooklyn, New York, District No. 14, 543 F 2d 979 (1976).

Petitioner's personnel file contains numerous documents that rightfully restrict employment possibilities in other school systems in and out of the state of Massachusetts and prevent Petitioner from pursuing his profession and thereby restricting interstate travel. His personnel file contains items such as District Court documents, Court of Appeals documents, parent letters concerning court action and documents relative to Quincy School Committee meeting concerning the removal of Petitioner from his current academic assignment. The court should examine, as it has done in the past, whether the result of actions erects a real and purposeful barrier to movement. See Goldberg v. Kelley, 397 U.S. 254, 264, 25 L Ed 2d 287, 90 S CT 1011 (1970). The constitutional right of interstate travel is virtually unqualified. See United States v. Guest, 383 U.S. 745, 757-758, 16 L Ed 2d 239, 86 S CT 1170 (1966); Griffin v. Breckenridge, 403 U.S. 88, 105-106, 29 L Ed 2d 338, 91 S CT 1790 (1971).

Finally, the correctness of the decision

below is open to serious question. The record shows quite plainly that the trial judge admitted that Petitioner never received a hearing and the trial judge based his decision to deny Petitioner a Summary Judgment, in part, because of the effect it may have on all public employees throughout our nation. It appears that the First Circuit concurred with the trial as to the effect a Summary Judgment could have nationally. The above rationale cannot be justified and certainly cannot be justified by the time honored consideration of fairness.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and unpublished opinion of the First Circuit.

Represented by:

Thomas P. Kramer, Esq.
1020 Plain Street
Marshfield, MA 02050
(617) 837-5000

Submitted by:

David W. Joly, Petitioner
48 North Bayfield Road
Quincy, MA 02171

October 10, 1980

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 80-1181.

DAVID W. JOLY,
Plaintiff, Appellant,

v.

LAWRENCE P. CREEDON,
Defendant, Appellee.

JUDGMENT

Entered: July 16, 1980

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district is affirmed.

By the Court:

DANA H. GALLUP
Clerk

By /s/Francis P. Scigliano
Chief Deputy Clerk

(cc: Messr. Goldfarb and Ms. Tate.)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 80-1181

DAVID W. JOLY,
Plaintiff, Appellant,

v.

LAWRENCE P. CREEDON,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

(Hon. W. Arthur Garrity, Jr., U. S. District Judge)

Before

Campbell and Bownes, Circuit Judges,

and Boyle,* District Judge.

Jerry A. Goldfarb, with whom David W. Joly was on brief, for appellant.
Regina Williams Tate, with whom Murphy, Lamere & Murphy was on brief, for appellee.

July 16, 1980

---

* Of the District of Rhode Island, sitting by designation.

CAMPBELL, Circuit Judge. Plaintiff David W. Joly, a Quincy, Massachusetts, public school-teacher, appeals from the dismissal of his 42 U.S.C. Section 1983 complaint for failure to state a claim upon which relief can be granted. Plaintiff contends he was denied procedural due process when Quincy school authorities placed two letters in his personnel file criticizing him for a classroom incident without affording him a prior hearing. The district court dismissed the complaint for failure to allege deprivation of a constitutionally protected property or liberty interest sufficient to trigger a due process hearing requirement.

On May 7, 1979, the principal of the elementary school where Joly teaches and serves as assistant principal sent Joly a letter concerning an incident that occurred in Joly's classroom on May 3. According to the letter, Joly permitted the class to vote on which students in the class did not get along well with others. Two students were singled out for criticism and comment on their inability to

get along. The letter stated, in part, "You have subjected children to public embarrassment, violated good pedagogical theory and acted in opposition to the Quincy Public Schools goal of 'humane treatment of little folk.'" In accordance with the collective bargaining contract between the school system and the teachers' organization, this letter was sent to Joly for him to read and sign before it was placed in his personnel file. The contract also ensured Joly the right to respond in writing to the letter, and to have his response placed in his file alongside the letter criticizing him.

On May 8, 1979, Joly was sent a second letter, this one from the director of Elementary Education, Wilfred Nolan. This letter stated that Nolan had reviewed the earlier letter and that he was "in complete agreement" with the principal's actions. "It is inconceivable that a teacher would ever set up a classroom situation which would result in public embarrassment to any student member of the classroom," the

letter said. Nolan also stated in the letter that he was "distressed" by Joly's refusal either to read or sign the letter sent him by the principal, since under the agreement the teacher's signature on such a letter would not indicate agreement with its contents.

The record also contains an undated letter from Joly to Nolan responding to certain statements contained in the two earlier letters. In his letter, Joly did not dispute the administrators' version of the underlying facts. He did state that "the practice he (Joly) has been accused of by the Principal has been accepted by three previous Principals during the past ten years at this school." Joly also defended his judgment in employing the particular practice: "The program is sound and within the framework of the prescribed subject matter." The letter ended with the statement that Joly "feels that perhaps this matter should be brought in front of a federal judge for adjudication."

During appellate argument, plaintiff

abandoned the contention that placement of the two letters in his file deprived him of a protected property interest. He was well advised to do so. Plaintiff was not fired, demoted, or denied a position to which he was entitled. His salary was not affected. No position or benefit to which he was entitled was taken away. A protected property interest is limited to an interest to which the individual concerned has a legitimate claim of entitlement. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Perry v. Sindermann, 408 U.S. 593, 601-02 (1972).

Joly argues, however, that he has a protected "liberty" interest in preventing derogatory material from being placed in his permanent personnel file. We do not think this claim can be sustained in the circumstances of this case. To begin with, plaintiff has not asserted that the allegedly "stigmatizing" material in the letters has been, or will be, made public, even to a prospective employer. The collective bargaining agreement explicitly limits

access to a teacher's personnel file to the teacher himself, the current principal, members of the school committee, members of the teachers association personnel committee, and a limited number of supervisory administrators. The Supreme Court has indicated that a person is not "stigmatized" so as to infringe a protected liberty interest unless the charges against that person are made public. Bishop v. Wood, 426 U.S. 341, 348-49 (1976); cf. Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

Furthermore, plaintiff does not dispute the occurrence of the classroom incident mentioned in the two letters. The dispute is over whether what he did amounted to good teaching practice. The Supreme Court has indicated that where a public employee claiming only a liberty interest does not contest the factual predicate of material placed in his personnel file, there is literally nothing to hold a due process hearing about. Codd v. Velger, 429 U.S. 624, 627 (1977). Here, any interest of Joly's in rebutting the opinions expressed by his superiors

and offering his own justification for what he did, was adequately protected by his right to respond in writing and to have that response included in his file. Due process requires no more.

Affirmed; costs to appellee.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

DAVID W. JOLY, Plaintiff	)	
vs.	)	CA 79-1709-G
LAWRENCE P. CREEDON Defendant	)	

JUDGMENT

GARRITY, J.

In accordance with the Court's allowance of defendant's motion to dismiss, after hearing on February 19, 1980, it is ORDERED:

that the case be, and it is hereby, dismissed.

By the Court:

STEPHEN A. MOYNAHAN, JR.
Deputy Clerk

Dated: February 19, 1980

No. 80-598

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

DAVID W. JOLY,
PETITIONER

V.

LAWRENCE P. CREEDON,
RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Timothy J. Murphy, Esq.
Arthur P. Murphy, Esq.
Regina Williams Tate, Esq.
Murphy, Lamere and Murphy
250 Granite Street
South Shore Plaza
Braintree, MA 02184
Telephone: (617) 848-1850

I.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES CITED ii

QUESTIONS PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 3

ARGUMENT 6

1. THE COURT SHOULD NOT GRANT CERTIORARI, SINCE THE DECISION OF THE COURT OF APPEALS COMPORTS WITH PRECEDENT 6

A. The Complaint Was Properly Dismissed Since Petitioner Was Not Denied A Constitutionally Protected Liberty Interest 7

B. The Complaint Was Properly Dismissed Because The Petitioner Was Accorded All The Process To Which He Was Entitled 14

CONCLUSION 21

II.

TABLE OF AUTHORITIES CITED

CASES.

Austin v. Bd. of Educ. of Georgetown, 562 F. 2d 446 (7th Cir. 1977)

Bishop v. Wood, 426 U.S. 341 (1976)

Board of Regents v. Roth, 498 U.S. 564 (1972)

Buttfield v. Stranahan, 192 U.S. 470 (1904)

Cafeteria Workers v. McElroy, 367 U.S. 886 (1961)

Codd v. Velger, 429 U.S. 624 (1977)

Colaizzi v. Walker, 542 F. 2d 969 (7th Cir. 1976) cert. denied, 430 U.S. 960 (1977)

Epperson v. Arkansas, 393 U.S. 97 (1968)

Goldberg v. Kelly, 397 U.S. 254 (1970)

Goss v. Lopez, 419 U.S. 565 (1975)

Ingraham v. Wright, 430 U.S. 651 (1977)

Jay v. Boyd, 351 U. S. 345 (1956)

Knauff v. Shaughnessy, 338 U.S. 537 (1950)

Longarzo v. Anker, 578 F. 2d 469 (2d. Cir. 1978)

Lyons v. Sullivan, 602 F. 2d 7 (1st Cir. 1979), cert. denied, _____U.S._____, 100 S. Ct. 1959 (1979)

Matthews v. Eldridge, 424 U.S. 319 (1976)

Meachum v. Fano, 427 U.S. 215 (1976)

Moore v. Otero, 557 F. 2d 435 (5th Cir. 1977)

Morrissey v. Brewer, 408 U.S. 471 (1972)

Needleman v. Bohlen, 602 F. 2d 1 (1st Cir. 1979)

Oceanic Navigation Co. v. Stranahan, 214 U.S. 320 (1909)

Ortwein v. Macky, 511 F. 2d 696 (5th Cir. 1975)

Paul V. Davis, 424 U.S. 693 (1976)

Sims v. Fox, 505 F. 2d 857 (5th Cir. 1974)

Sullivan v. Brown, 544 F. 2d 279 (6th Cir. 1976)

Swilley v. Alexander, 448 F. Supp. 702 (S.D. Ala. 1978)

Teachers United For Fair Treatment v. Anker, 445 F. Supp. 469 (E.D.N.Y. 1977)
Willens v. University of Massachusetts, 570 F. 2d 403 (lst Cir. 1978)

STATUTES.

United States Consititution, Fourteenth Amendment
28 U.S.C. §1343
42 U.S.C. §1983

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Due Process Clause of the Fourteenth Amendment required that procedural due process be provided to David W. Joly before two letters of reprimand were placed in his personnel file.

II. If David W. Joly was entitled to procedural due process before two letters of reprimand were placed in his personnel file, whether the procedures outlined in the collective bargaining agreement were constitutionally adequate under the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

David W. Joly a teacher and assistant principal in the Quincy Public Schools, brought this action pursuant to 42 U.S.C. §1983, 28 U.S.C. §1343 and the Fourteenth Amendment to the United States Constitution. (Complaint 2-3). The Defendant in the action is Lawrence P. Creedon, Superintendent of the Quincy Public Schools. (Complaint 3).

Appellant, David W. Joly, has been a public school teacher for twenty-three years; since 1967, he has served in another capacity as assistant principal in the Quincy Public Schools. (Complaint 2-3). On May 7, 1979, Mr. Joly received a letter from Jean Ann MacLean, Principal of the Myles Standish School. (Complaint, Ex.A). In that letter, Ms. MacLean reviewed an incident which occurred in Mr. Joly's classroom, namely the voting by students on those children who do not get along well with others; one child termed the activity "choosing Public Enemy Number One." (Complaint, Ex. A). As a result of the voting, two children were given the dubious honor of being the children who did not get along well with others. (Complaint, Ex. A). The other children in the class then analyzed why these two children did not get along with others. (Complaint, Ex. A). A parent of one of the elected children filed a formal complaint. (Complaint, Ex. A). In her letter, Ms. MacLean stated that Mr. Joly had subjected children to embarassment, had violated good pedagogical theory and had acted in opposition to the Quincy Public Schools' goal of "humane treatment of little folk." Mr. Wilfred Nolan, Director of Elementary Education, sent a letter to Mr. Joly on May 8, 1979, indicating that he agreed with the actions taken by Ms. MacLean. (Complaint, Ex. B). In his letter, Mr. Nolan indicated to Mr. Joly that if he disagreed with the substance of Ms. MacLean's letter, he could respond in writing and have his rebuttal attached to Ms. MacLean's document for insertion in his personnel folder. (Complaint, Ex. B). At some point, these two letters were placed in the personnel file of Mr. Joly.

Appellant and other teachers in the Quincy Public Schools, are represented by the Quincy Education

PREVIOUS PAGE WAS BLANK

Association. (Complaint 4). A contract between the Quincy Education Association and the Quincy School Committee has existed since 1969. (Complaint 5). The most recent agreement had a duration from 1977-1979. The collective bargaining agreement contains a grievance and arbitration procedure. (Complaint, Ex. E, 4-6). A grievance is defined as a violation, misinterpretation or misapplication of any of the express provisions of the agreement. (Complaint, Ex. E, 4). One of the express provisions in the contract deals with the insertion of material in a teacher's personnel file, namely Article XXII (Complaint, Ex. E, 21-23). The contract provides that a teacher must be given a copy of the material or letter and the opportunity to write a rebuttal to the material or letter, whereupon both documents would be placed in the teacher's personnel file as part of the permanent record. (Complaint, Ex. E, 22).

Mr. Joly filed an undated memorandum with Mr. Nolan, the subject of which was the two letters of May 7 and 8, 1979. (Complaint, Ex. C). In that memorandum, Mr. Joly claimed that the program used in the classroom on May 3, 1979 was sound and that his constitutional rights had been violated. (Complaint, Ex. C). Mr. Joly did not file a grievance, but rather filed the instant action.

Joly claimed that the insertion of letters of reprimand in his personnel file without a trial-type hearing prior to including those letters in his file, violated the Due Process Clause of the Fourteenth Amendment. (Complaint 8). Respondent filed a Motion to Dismiss in answer to Joly's complaint. Respondent asserted in part, that the complaint failed to state a claim upon which relief could be granted in that Joly had no right to procedural due process prior to the inclusion of the two letters in his file; even if he were entitled to procedural due process, the procedures contained in the collective bargaining agreement were constitutionally adequate. Petitioner filed a Motion for Summary Judgement which was consolidated for hearing with Defendant's Motion to Dismiss. The hearing was held on February 19, 1980 before Garrity, J. Judge Garrity granted respondent's Motion to Dismiss for failure to state a claim upon which

relief can be granted, pursuant to Fed. R. Civ. Proc. 12(b)(6).

On July 16, 1980, the United States Court of Appeals for the First Circuit affirmed the decision of the District Court.

ARGUMENT

I. THE COURT SHOULD NOT GRANT CERTIORARI, SINCE THE DECISION OF THE COURT OF APPEALS COMPORTS WITH PRECEDENT

Review by this Court on writ of certiorari is not a matter of right. Rather, such review lies in the sound discretion of the Court. Generally, the Petitioner must demonstrate that the questions on review present important issues for decision by the Court. Petitioner has failed to show the requisite novelty or importance which must be demonstrated before the Court grants certiorari.

In this case, the opinion and decision of the First Circuit Court of Appeals comports with decisions rendered by this Court and the other Courts of Appeals. There is no decision by another Court of Appeals which conflicts with the lower court's decision. The question created for review by the Court of Appeals for the First Circuit had been decided in a number of by decisions rendered by this Court in the last twelve years. Thus, granting certiorari would be a waste of judicial resources.

Although, at the district court level Petitioner raised the argument that he had been denied a constitutionally protected property interest, he waived this issue at oral argument before the court of appeals. Thus, the sole issue remaining is whether the placement of two letters of reprimand in the personnel file of Petitioner implicated a constitutionally protected liberty interest such that Petitioner was entitled to procedural due process. It is clear from existing precedents, analyzed below that the answer to that question is a resounding "No", and thus, the discretion of this Court would be utilized best by denying the petition for a writ of certiorari.

A. The Complaint Was Properly Dismissed Since Petitioner Was Not Denied A Constitutionally Protected Liberty Interest.

It is clear that for a litigant to establish a right to procedural due process, the individual must have been deprived of a constitutionally protected liberty or property interest through state action. This Court has rejected the notion "that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause." *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976). Preliminarily then, it is necessary to consider the type of interests, the deprivation of which invokes the Due Process Clause.

At one time, analysis of the right to due process turned on the characterization of the interest at stake as being a right or a privilege.

> "Where it has been possible to characterize the private interest . . .as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required."
>
> *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961), citing *Oceanic Navigation Co.*, v. *Stranahan*, 214 U.S. 320, 340-343; *Knauff* v. *Shaughnessy*, 338 U. S. 537: *Jay* v. *Boyd*, 351 U.S. 345, 354-358; c.f. *Buttfield* v. *Stranahan*, 192 U.S. 470, 497.

The Court eventually rejected the wooden distinction between rights and privileges. In *Board of Regents* v. *Roth*, 408 U.S. 564, 569 (1972), this Court indicated that the requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. Although the Court indicated that these interests involve a panopoly of property and liberty, it nonetheless stated that boundaries on those interests protected by the Due Process Clause had

to be set. In the years following *Roth*, the Court set about to establish those boundaries. In *Paul v. Davis*, 424 U.S. 693 (1976), the *Bishop v. Wood*, 426 U.S. 341 (1976), this Court made clear that the boundaries on those property and liberty interests protected by the Constitution are established by state law. If an individual is entitled to a property or liberty interest under state law, then the Due Process Clause comes into play. Thus, in the case at bar, Petitioner had to allege a state-created liberty interest, an "entitlement," which was infringed by his two superiors' acts of placing letters in his personnel file. The liberty interest which the Petitioner has placed in issue, related to the liberty interest in one's reputation, namely, freedom from being stigmatized. Recent cases establish that liberty interests, like property interests, must be viewed with reference to state law. *Meachum v. Fano*, 427 U.S. 215 (1976) (prisoners' transfer); *Paul v. Davis*, 424 U.S. 693 (1976) (reputation); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole).

Further, in *Paul v. Davis*, 424 U.S. 693 (1976), this Court decided that defamation, standing alone, did not state a claim for relief under 42 U.S.C. §1983 and the Fourteenth Amendment. In that case, two chiefs of police distributed to merchants a leaflet in which the plaintiff was listed as an active shoplifter, even though the plaintiff had never been convicted of a crime. In dealing with the issue of whether reputation alone is either liberty or property sufficient to invoke the Due Process Clause, the Court analyzed its long history of cases and concluded that the deprivation of reputation or one's good name, without state denial of some other interest, is not sufficient.

The Court, in *Paul v. Davis*, relied upon *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) where it stated:

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and association in his community. It did not base the nonrenewal of his contract on a charge, for example that he had been guilty of dishonesty, or immorality. . .

> Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma, or other disability that foreclosed his freedom to take advantage of other employment opportunities. . ."

Both *Paul v. Davis* and *Roth* indicate that for an individual to allege sufficiently a constitutional violation, there must be stigma plus the denial of a protected benefit. Stigma, itself, contains two components: publication and a charge, like dishonesty or immorality, that would seriously damage one's standing in the community. In the case at bar, a reading of the complaint indicates that there was no publication, no stigmatizing material and no denial of a benefit; the Petitioner cannot meet the "Stigma plus" test. Further, the hearing required in the case of stigmatization by the state only provides the individual with the opportunity to clear his name. Thus, the plaintiff must allege the falsity of the charges or his complaint is defective. *Codd v. Velger*, 429 U.S. 624 (1977). Since Mr. Joly has never denied the events of May 3, but rather only disagrees with the educational judgments of his superiors about those events, then his claim has this additional defect.

Mr. Joly did not allege in the complaint that the letters of reprimand were ever publicized; he only alleged that the letters were placed in his personnel file. The collective bargaining agreement refutes any implication that publication of the letters took place. Article XXII, Member Evaluation states that:

> "No persons, other than the member's current principal, the member, members of the Committee, the Assistant Superintendent in charge of instructional personnel, the Superintendent or his clerical designee, the Assistant Superintendent of Curriculum or his clerical designee, or the members of the Association's personnel screening committee, shall have access to a member's personnel file."

Thus, a very limited group of persons has access to an individual's personnel file and in the case at bar, there is no allegation that even this group of persons ever saw the letters in Mr. Joly's personnel file. No publication of the letters occurred. The Court Of Appeals specifically noted that no publication of the letter had taken place.

In a number of cases, courts have rejected a plaintiff's claim of deprivation of a liberty interest because of the failure to allege publication. *Bishop v. Wood,* 426 U.S. 341 (1976); *Webster v. Redmond,* 599 F. 2d 793 (7th Cir. 1979); *Longarzo v. Anker,* 578 F. 2d 469 (2nd Cir. 1978). In *Colaizzi v. Walker*, 542F. 2d 969 (7th Cir. 1976), cert. denied, 430 U.S. 960 (1977), there was no question of publication, since the Governor, in dismissing the plaintiff, had issued a press release citing the reasons for the dismissal. The Court of Appeals had to remand the case in *Austin v. Bd. of Educ. of Georgetown,* 562 F. 2d 446 (7th Cir. 1977); the plaintiff alleged publication, which was denied by the defendant. The court indicated that public knowledge of stigmatizing charges leading to the non-renewal of a teacher's contract was not sufficient; the Board of Education had to be the party responsible for publication in order to find stigmatization. In the case at bar, there is not dispute about publication; neither party asserts that the letters were publicized. Thus, Mr. Joly cannot make out a claim of deprivation of a liberty interest.

Further, the letters themselves were not stigmatizing. The two letters indicated that the principal and Director of Elementary Education did not approve of the classroom activity in which Mr. Joly had permitted his students to engage. These letters show that the principal and Director of Elementary Education had a difference of Educational opinion with Mr. Joly. The district court adopted this view and further found that letters displaying differing educational opinions are not stigmatizing.

In *Roth,* the Court indicated that stigmatizing material would be exemplified by a charge of dishonesty or immorality. 408 U.S. at 573. *In Willens v. University of Massachusetts,* 570 F. 2d 403 (1st Cir. 1978), the Court of

Appeals for the First Circuit agreed with the district court's finding that the reasons for denying plaintiff tenure in that case were not stigmatizing; Judge Skinner found that the reasons did not involve moral turpitude or dishonesty. In both *Austin v. Bd. of Educ.*, 562 F. 2d 446 (7th Cir. 1977) and *Colaizzi v. Walker*, 542 F. 2d 969 (7th Cir. 1976), the charges were found to be stigmatizing; the charges in these two cases involved immorality and criminal activity respectively. There was no question that in the latter two cases, an individual's standing in the community would be affected by publication of the charges.

In the case at hand, the letters to Mr. Joly did not charge him with criminal activity, immorality, dishonesty or any act resembling these charges. The letters to Mr. Joly challenged his pedagogical technique and philosophy. An educational judgment concerning Mr. Joly's performance was made, just as in Mr. Roth's case, and the teacher was found to be lacking or remiss in some respect. Thus, the material included in Mr. Joly's personnel file does not fall within the category of stigmatizing material.

Finally, even if this Court should find that the letters were published and of a stigmatizing nature, Mr. Joly has not alleged a constitutionally protected liberty interest. In order for the publication of stigmatizing material to rise to the level of deprivation of a protected liberty interest, there must be a deprivation of some other interest, granted by the state. *Paul v. Davis*, 424 U.S. 693 (1976).

The courts have faithfully followed the Supreme Court's analysis in *Paul v. Davis*. In *Lyons v. Sullivan*, 602 F. 2d 7 (1st Cir. 1979), cert. denied,_____U.S._____, 100 S.Ct. 159 (1979), this court found that the teacher did not allege a liberty interest sufficiently because the defamation did not occur in the course of his termination from employment. A tenured teacher was reprimanded, transferred to another school, and a letter of reprimand placed in her personnel file in *Sullivan v. Brown*, 544 F. 2d 279 (6th Cir. 1976). The court of appeals held that the teacher had not alleged sufficiently a liberty interest because

she had not been terminated from her employment. The transfer was not a sufficient deprivation of a property interest, combined with the stigmatizing material, to show a deprivation of a liberty interest.

Likewise, in *Swilley v. Alexander*, 448 F.Supp. 702 (S.D. Ala. 1978), a teacher was reprimanded for leaking to the press certain information and a letter of reprimand was placed in his personnel file. The court, on authority of *Ortwein v. Macky*, 511 F. 2d 696 (5th Cir. 1975) and *Sims v. Fox*, 505 F.2d 857 (5th Cir. 1974), found that the letter of reprimand did not infringe on the teacher's constitutional rights. The court implied that the basis of its decision was twofold; the "stigma" was not serious enough, nor did it foreclose employment opportunities.

There have been a number of cases where the public employee has been given an unsatisfactory rating for his performance. In those cases, the courts have uniformly held that the unsatisfactory rating, absent a deprivation of a protected property interest, was not a liberty interest sufficient to invoke the Due Process Clause. *Bishop v. Wood*, 426 U.S. 341 (1976); *Longarzo v. Anker*, 578 F.2d 469 (2nd Cir.1978); *Moore v. Otero*, 557 F.2d 435 (5th Cir. 1977); *Teachers United For Fair Treatment v. Anker*, 445 S.Supp. 469 (E.D.N.Y. 1977).

In the Petition for Writ for Certiorari, Petitioner, apparently in an attempt to establish the requisite liberty interest, has referred to certain events which are not part of the record and not properly before this Court. The complaint was filed in district court in August, 1979. Yet, in his petition, the Petitioner refers to a newspaper story printed on February 20, 1980, a school committee meeting attended by Petitioner and parents who had read the story and a meeting between Petitioner and his union on March 3, 1980. The events not only occurred after the complaint as filed, but also after a decision was rendered by the district court. Even if these events could be considered by this Court, they do not enhance Petitioner's case. These events do not establish that Petitioner has been deprived of any benefit by Respondent or by the Quincy School Committee.

Finally, Petitioner estimates for the first time at this

level that, in addition to the stigma credited by these letters, the Petitioner's right to interstate travel has been infringed. The short answer to such an argument is that the record fails to disclose any facts implicating the rights to interstate travel.

The cases cited above are clearly applicable to the instant case. Since Mr. Joly has continued in his employment as both teacher and assistant principal the presence of stigmatizing material in his personnel file, even if it had been published, does not rise to the level of a deprivation of a liberty interest protected by the Due Process Clause. Therefore, dismissal of the Petitioner's complaint was proper and correctly affirmed by the court of appeals.

B. The Complaint Was Properly Dismissed Because The Petitioner Was Accorded All The Process To Which He Was Entitled.

Even if the Petitioner had been deprived of an entitlement sufficient to trigger the requirements of the Due Process Clause, the complaint was still properly dismissed. Once the court has determined that a litigant is entitled to due process, the question still remains what process is due. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Constitutionally sufficient procedures were available to Mr. Joly. The opportunity for a teacher to inspect and rebut any material to be placed in his file prior to its inclusion, and the availability of a grievance and arbitration procedure, satisfy the requirements of due process.

When a letter is written about any Quincy Teacher, a set procedure is followed: "The teacher (is) given a copy of (the) letter to sign, and to write a rebuttal, whereupon both letters would be placed in the teacher's personnel file. . .". This procedure satisfies the core concerns of due process, namely, notice and the opportunity to be heard, although, as shown in Section A, the school system was not constitutionally required to follow this or any other procedure. The fact that a teacher is given a copy of any letter to be placed in his file for his signature, before the letter is placed in his file, satisfies the requirement of notice of potentially adverse governmental action. The opportunity for the teacher to rebut the contents of the letter, in writing, insures that a teacher will have an opportunity to present his view of the situation in the light he deems most favorable. Further, it is a permanent record to counteract the permanent record of reprimand. Thus, the core concerns of due process are satisfied by adherence to the procedures followed in the Quincy Public School System.

Further, as both the complaint and the collective bargaining agreement indicate, the Grievance and Arbitration Procedure, outlined in Article IV, provides for a post-determination hearing process. Under the Grievance and Arbitration Procedure, if utilized, Mr. Joly would have the right to challenge the factual basis and educational

conclusions concerning the events of May 3. Assumedly, the reason for Mr. Joly's desire for a hearing before Superintendent Creedon is to challenge his superiors' conclusions that the classroom activity was pedagogically improper. This is precisely the same function served by the Grievance and Arbitration Procedure. That procedure is even fairer than the hearing requested by Mr. Joly because he will have the advantage of "three bites of the apple", a hearing before the Superintendent, the full School Committee and an impartial hearing officer, the arbitrator.

That the dictates of due process can be satisfied by procedures contained in a collective bargaining agreement, is shown by the recent case of *Needleman v. Bohlen*, 602 F.2d 1 (1st Cir. 1979). That case involved a teacher who was denied a salary increment because of unsatisfactory performance. The court's description of the procedural protections in the collective bargaining agreement is strikingly similar to the procedural protections afforded by the Quincy Public Schools:

> The contract in this case accords a teacher significant procedural protections both before and after a determination is made to deny her increment. Evaluations of a teacher's performance are made with the full knowledge of that teacher, and the evaluation report is shown to the teacher who has the right to discuss it with her superiors. A teacher can review the contents of her personnel file, and no derogatory material can be placed in her file unless she has had an opportunity to review and answer such material. Before a teacher can lose her increment her principal must evaluate her and notify her in writing of any deficiencies by December 15. The principal must make another evaluation between December 15 and April 1, and, if the deficiencies still exist must notify the teacher of the recommendation to withhold the increment. The teacher has the right to an evaluation by another principal. Appellant her, and she was given an opportunity to respond to those charges in writing before the school committee acted on her case. After

the determination has been made, the agreement spells out a four level grievance procedure that culminates in arbitration if the teachers' grievance committee presses the appeal.

602 F.2d at 5. (emphasis supplied).

Both contracts provide for teacher review of materials prior to their being placed in a teacher's file, and both contracts allow a teacher to grieve any decision that is thought to be unfair. In *Needleman*, the court held that "the procedures afforded the (teacher) were constitutionally adequate." 601 F.2d at 5. It is important to point out that the procedures, so similar to those in use in the Quincy Public Schools, were adequate even though the teacher lost valued property, a salary increase, to which the contract entitled her.

In his complaint, Mr. Joly states that he seeks a full blown adversary hearing, complete "with attorney and stenographer." The fact that the procedures already established do not provide for an adversary hearing, does not, in and of itself, mean that Mr. Joly was denied due process, for "(t)he very nature of due process negates any concept of inflexible procedures applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). The validity of the procedures used must be measured by the possible harm inflicted and the administrative feasibility of providing a particular procedure. See, e.g., *Matthews v. Eldridge*, 424 U.S. 391, 348 (1976). A more recent formulation of this idea appears in *Ingraham v. Wright*, 430 U.S. 651, 680 (1977): "the question. . . (is) whether the incremental benefit could justify the cost. . ." Since, as Mr. Joly states in the complaint, that "(t)he number of teachers in Quincy, with letters in their files, is very large," (emphasis supplied), the cost and administrative problems involved in providing a full adversary hearing every time a letter was to be placed in a teacher's file would be enormous. Furthermore, the

expected benefits of such a procedure would be minimal.

Both the complexity and minimal benefits of a full adversary hearing in this context can be seen by examining the letter from Mr. Joly's principal and seeing the plethora of issues that a reasonably competent lawyer could raise. At an adversary hearing, some issues might be:

1. The relationship to the "choosing (of) Public enemy # 1" to the "Magic circle technique."

2. The relationship of the "choosing (of) Public enemy # 1" to "Socio - Gram" activity.

3. Whether Plaintiff "violated good pedagogical theory."

4. Whether Plaintiff violated the principle of "humane treatment of little folk."

5. Whether Plaintiff "exhibited poor judgment in honoring the request of the (departing) student."

6. Whether "each ensuing part of the activity" compounded that poor judgment.

The number of questions raised by these issues is enormous. For example: What standards should be used in resolving these issues? Should expert testimony be allowed? Required? Should the letter be included in the file if most of the charges are found to be true? Even cursory consideration of these problems reveals that requiring a full adversary hearing to determine whether the letters should be included in Mr. Joly's personnel file would require an enormous commitment of time, money, and administrative resources. When that expenditure is multiplied by the "very large" number of letters placed in personnel files, it becomes readily apparent that the resources required to process all these claims would not produce a commensurate benefit. The court should not cast such a heavy burden on the already overburdened public schools, and should heed the admonition of *Epperson v. Arkansas*, 393 U.S. 87, 104 (1968): "Judicial interposition in the operation of the public school systems of the nation raises problems requiring care and restraint."

A review of recent cases dealing with this Court's criteria for the required process indicates that the type of hearing and notice required by the Court has rarely approached the level which Mr. Joly seeks. The case of Goss v. Lopez, 419 U.S. 565 (1975) highlights the current Court's refusal to cast a heavy burden on public schools by requiring full adversary hearings whenever an injury is suffered. In Goss, the Court held that due process required that before a student could be suspended from an Ohio public school, he had to be given notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have against him and an opportunity to present his side of the story. 419 U.S. at 581. Yet the Court specifically denied the student's right to have counsel to confront and cross-examine witnesses and to call his own witnesses. 419 at 583. The rationale for this result was that "(t)o impose. . . even truncated trial-type procedures might well overwhelm administrative facilities. . . and cost more than it would save in educational effectiveness." 419 U.S. at 583. These should be the same concerns in the case at hand. The District Court noted that:

> "to require a hearing previous to addition to a Governmental employee's personnel folder or, as in this instance, what was characterized as a letter of reprimand, would. . .subject (public schools) to a considerable burden, which is not warrented in my view." (App. 42).

In addition, these onerous procedural requirements would "apply not simply to school departments but (also) to other governmental agencies." The court should hesitate to subject all governmental agencies to these procedural requirements.

Another enlightening case is Matthews v. Eldridge, 424 U.S. 319 (1976), in which the Supreme Court upheld as constitutionally adequate the procedures of the Social Security Administration in terminating disability benefits.

After the state agency obtained information indicating that the worker was no longer disabled, the agency would inform the individual that it no longer considered him to be disabled and would cite the reasons for its determination. The worker could then submit a written statement with additional documentation to support a conclusion of disability. After the state agency determined that the individual was not disabled, it would notify him of his ineligibility and indicate his right to seek a reconsideration. After the reconsideration decision was made, the individual then had a right to an evidentiary hearing. Except for the submission of written date, prior to the determination of eligibility, procedures to challenge the decision were post-determination.

The Court felt particularly comfortable with the fact that written evidence could be submitted by the disabled worker and medical sources after the first notification of disability ineligibility. The Court contrasted this situation with that in *Goldberg v. Kelly*, 397 U.S. 254 (1970), where the individuals involved were probably not capable of responding adequately in writing and where veracity and credibility were more in issue and only fully capable of being tested within an evidentiary hearing.

Matthews is important because of the similarity in the hearing process to that in the present case. Like *Matthews*, the teacher, here Mr. Joly, is notified of the letter of reprimand and has the opportunity to read it; thus, the teacher is fully aware of the charges. The teacher is encouraged to write a written rebuttal to the letter; both the rebuttal and the letter are included in the file as a permanent record. Surely, there can be no question that this process is adequate when the individual involved is highly educated and responsible for teaching others. At that point, the teacher has three hearings with the third being a full blown, evidentiary hearing before an arbitrator, just as in *Matthews*, the recipient had a number of resources culminating in a hearing. Surely, if these procedures were adequate in *Matthews*, where a disabled worker was denied his income

for a number of months, then the procedures in Quincy, applied in Mr. Joly's case, are adequate where he was deprived of nothing.

In sum, Petitioner's complaint was properly dismissed because even if the Due Process Clause is applicable in this case, the procedures utilized in the Quincy School system have afforded, or could have afforded, Mr. Joly all the process to which he is entitled.

II. CONCLUSION

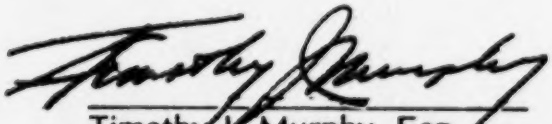
It is clear from the foregoing analysis that the decision rendered by the Court of Appeals fully comports with existing case law at this Court's level, as well as that of the other courts of appeal. Far from presenting any novel or important issue, the Petitioner's questions for review have been repeatedly addressed and answered by this Court in the past twelve years. This Court should utilize its discretion by denying certiorari.

Respectfully submitted,

Timothy J. Murphy, Esq.
Arthur P. Murphy, Esq.
Regina William Tate, Esq.

CERTIFICATE OF SERVICE

This is to certify that I, Timothy J. Murphy, of Murphy, Lamere and Murphy, 250 Granite Street, Braintree, MA 02184 did serve a copy of the foregoing Respondent's Brief in Opposition To Granting Certiorari To The United States Court Of Appeals For The First Circuit by miling postage prepaid this date, November 13, 1980, to Thomas P. Kramer, Esq., at the law offices of Thomas P. Kramer and Francis X Tansey, 1020 Plain Street, Marshfield, MA 02050.



Timothy J. Murphy, Esq.
Murphy, Lamere and Murphy
250 Granite Street
South Shore Plaza
Braintree, MA 02184
Telephone: 848-1850